United Malayan Banking Corporation Bhd v Pembinaan KSY Sdn Bhd & Ors

SUPREME COURT (IPOH) — CIVIL APPEAL NO 03-101-92
ABDUL HAMID OMAR LP, EUSOFF CHIN AND MOHAMED DZAIDDIN SCJJ
9 JULY 1993

Civil Procedure *— Summary judgment — Appeal — Action to recover money lent and interest — Whether there were triable issues — Rules of the High Court 1980 O 14*

Civil Procedure *— Summary judgment — Appeal — Triable issues arose out of evidence — Whether appellate court should interfere with judge's discretion —Rules of the High Court 1980 O 14*

The appellant had granted to the first respondent banking facilities for a total amount of RM7m and in consideration thereof the second and third respondents together with another person since deceased executed a continuing guarantee and indemnity in favour of the appellant for the repayment of the said principal sum advanced to the first respondent and interest. The first respondent defaulted in the repayment of the banking facilities and the appellant then sent notices to the respondents and the other person demanding payment of the sum owing together with interest. The appellant later commenced legal action against the respondents claiming for the amount due and interest. The respondents and the other person filed the defence and counterclaim. It appeared that the appellant was holding the properties and the public-quoted shares of the first respondent and that although the first respondent had asked the appellant to sell the said shares, the appellant delayed in doing so with the result that the shares were sold at a lower price. The registrar gave leave to the appellant to sign final judgment under O 14 of the Rules of the High Court 1980 but on appeal, the learned judge allowed the appeal. He held that the transaction in respect of the shares was not one of pledge but of mortgage and that the parties had intended that the shares were to be mortgaged and not pledged to the appellant. The learned judge also held that on the evidence the appellant was at fault in not selling the shares immediately as requested by the first respondent and therefore there were triable issues which should be decided at the trial. The appellant has appealed.

Held, dismissing the appeal:

(1) The approach to be taken by the appellate court in an O 14 appeal has been settled. The appellate court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing.

(2) In the present appeal, since the triable issues as found by the learned judge arose as a matter of evidence, it would be wrong for the court to interfere with the learned judge's discretion. The court also, after considering the issues raised in the defence, was

in complete agreement with the conclusions of the learned judge. This was not therefore an appropriate case for summary judgment.

[Bahasa Malaysia summary

Perayu telah memberi penentang pertama kemudahan perbankan berjumlah sebanyak RM7 juta dan sebagai balasan penentang kedua dan ketiga bersama seorang lain yang sudahpun meninggal dunia, telah menyempurnakan suatu jaminan dan indemniti yang berterusan memihak kepada perayu untuk pembayaran balik wang pokok yang dipinjamkan kepada penentang pertama bersama dengan bunga. Penentang pertama telah ingkar membayar balik kemudahan perbankan itu dan perayu telah menghantar notis kepada penentang-penentang dan seorang yang lain itu meminta pembayaran jumlah yang terhutang bersama dengan bunga. Kemudiannya, perayu telah memulakan tindakan undang-undang terhadap penentang menuntut jumlah wang yang perlu dibayar bersama dengan bunga. Penentang dan seorang yang lain itu telah memfailkan pembelaan dan tuntutan balas. Telah didapati bahawa perayu sedang memegang harta dan saham disenarai awam kepunyaan penentang pertama dan sungguhpun penentang pertama telah meminta perayu menjual saham itu, perayu telah melengahkan membuat demikian. Pendaftar telah memberi izin kepada perayu untuk mendapat penghakiman muktamad di bawah A 14 Kaedah-Kaedah Mahkamah Tinggi 1980 tetapi apabila rayuan dibuat, hakim yang arif telah membenarkan rayuan itu. Beliau memutuskan bahawa transaksi berkaitan dengan saham-saham bukanlah suatu sandaran tetapi merupakan suatu gadai-janji dan pihak-pihak itu telah bertujuan supaya saham-saham itu digadai-janji dan bukan disandarkan kepada perayu. Hakim yang arif juga memutuskan bahawa dari keterangan di dalam kes itu, perayu telah salah kerana tidak menjual saham-saham itu dengan segera apabila sahaja diminta berbuat demikian oleh penentang pertama dan oleh itu, terdapat isu-isu yang perlu diputuskan di dalam perbicaraan itu. Perayu telah membuat rayuan.

Diputuskan, menolak rayuan itu:

(1) Pendekatan yang harus diambil oleh mahkamah rayuan di dalam suatu rayuan di bawah A 14 adalah jelas. Mahkamah rayuan itu tidak seharusnya menganggap rayuan itu sebagai penyemakan penggunaan budi bicara hakim tetapi hendaklah mengendalikan kes itu sebagai suatu pendengaran semula.

(2) Di dalam rayuan ini, oleh kerana isu-isu yang perlu dibicarakan seperti yang diputuskan oleh hakim yang arif telah timbul sebagai perkara keterangan, adalah tidak wajar untuk mahkamah mengganggu budi bicara hakim yang arif itu. Mahkamah juga, selepas menimbang isu-isu yang ditimbulkan di dalam pembelaan, bersetuju sepenuhnya dengan keputusan hakim yang arif itu. Oleh kerana itu, kes ini bukan kes yang sesuai untuk penghakiman terus.]

Notes

For a case on appeal against refusal to grant summary judgment, see 2 *Mallal's Digest* (4th Ed) para 2189.

For cases on triable issues with regards to summary judgments, see 2 *Mallal's Digest* (4th Ed) paras 2287–2296.

Cases referred to

1 *China and South Sea Bank Ltd v Tan Soon Gin @ George Tan* [1990] 1 AC 536 (refd)

2 *Standard Chartered Bank Ltd v Walker & Anor* [1982] 3 All ER 938 (refd)

3 *Kian Choon Investments (Pte) Ltd v Societe Generale & Anor* [1990] 2 MLJ 74 (refd)

4 *Bishop v Bonham* [1988] 1 WLR 742 (refd)

5 *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors* [1989] 3 MLJ 164 (folld)

6 *Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183 (folld)

7 *National Company For Foreign Trade v Kayu Raya Sdn Bhd* [1984] 2 MLJ 300 (folld)

8 *European Asian Bank AG v Punjab & Sind Bank (No 2) (CA)* [1983] 1 WLR 642; [1983] 2 All ER 508 (folld)

9 *Cow v Casey* [1949] 1 All ER 197; [1949] 1 KB 474 (refd)

10 *Lloyds Bank Ltd v Ellis-Fewster & Anor* [1983] 1 WLR 559 CA (folld)

Legislation referred to

Rules of the High Court 1980 O 14

Hira Singh (*Asbir Kaur* with him) (*Asbir, Hira Singh & Co*) for the appellant.

G Sri Ram (*PS Gill* with him) (*Gill & Tang*) for the respondents.

Cur Adv Vult

Mohamed Dzaiddin SCJ (delivering the judgment of the court): This appeal arises from the decision of Zakaria Yatim J given on 5 December 1992, allowing an appeal by the respondents against the decision of the registrar giving leave to the appellant to sign final judgment under O 14 of the Rules of the High Court ('the RHC') against the respondents for the sum of RM2,745,455.32 as at 30 September 1988 with further interest and costs.

The brief facts of the case are these. On 5 August 1983, the appellant granted to the first respondent banking facilities for a total amount of RM7m and in consideration thereof, the second and third respondents together with Kuah Sai Yok (deceased) executed a continuing guarantee and indemnity on 24 October 1983 in favour of the appellant for due repayment of the said total principal sum advanced to the first respondent together with interest. The first respondent defaulted in the repayment of these facilities. The appellant then sent notices of demand to the respondents

and Kuah Sai Yok (deceased), demanding payment of the sum of RM2,619,032 due and owing as at 22 April 1988 together with interest. On 24 November 1988, the appellant commenced legal action against the respondents claiming for the sum of RM2,745,455.32 being the amount due and owing by the respondents as at 30 December 1988 together with interest and costs.

On 9 January 1989, the respondents and Kuah Sai Yok (deceased) filed the defence, which was later amended on 5 March 1990, to include the counterclaim. For the sake of clarity, we quote the relevant paragraphs of the amended defence which are as follows:

> 6 On 30 March 1988, the plaintiff suddenly and without just cause recalled the facilities granted to the first defendant notwithstanding that the defendant's properties and the public-quoted shares were still being held by the plaintiff.
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> ...
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> 10 In order to be able to comply with the conditions referred to above, on 17 August 1989 the first defendant wrote to the plaintiff seeking permission to dispose of all their public-quoted shares to repay the plaintiff RM750,000 as opposed to the RM500,000 requested by the plaintiff which proposal was rejected by the plaintiff.
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> 11 On 7 September 1989, the first defendant wrote to the plaintiff once again requesting that the said shares be disposed of and again the plaintiff refused to accede to the first defendant's request.
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> 12 The defendants contend that had the plaintiff disposed of the shares as requested, they would have recovered a sum of no less than RM7m which figure covers the amounts unreasonably demanded by the plaintiff and that it is as a result of the plaintiff's own negligence that it has had to resort to this legal action.
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> ...
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> 15 The defendants aver and will aver that the plaintiff wrongfully recalled the said facilities and in breach of the agreements entered into between the plaintiff and the first defendant refused to allow the first defendant to liquidate its assets.

The issues on appeal, ie whether or not the amended defence discloses an arguable or triable case, are dealt with by the learned judge in his written judgment (pp 15–48 AR). The learned judge approached the matter in the following manner. He addressed himself to two principal issues, namely, whether the public-quoted shares were pledged or mortgaged by the first respondent to the appellant and secondly, whether the appellant owed a duty of care to the respondent, and if so, whether that duty of care had been properly or reasonably exercised in obtaining the best price for the said shares.

On the first issue, after considering the written submissions of counsel and examining the relevant laws on the pledge and the affidavit evidence, the learned judge was satisfied that the transaction between the parties in respect of the said public-quoted shares was not one of pledge but of a mortgage, and that the parties had intended that the said public-quoted shares were to be mortgaged and not pledged to the appellant.

On the issue whether the appellant as mortgagee owed a duty of care to the first respondent with respect to the disposal of the said public-quoted

A shares, the learned judge examined the authorities cited by counsel, particularly the Privy Council decision in *China and South Sea Bank Ltd v Tan Soon Gin @ George Tan*,[1] which was heavily relied on by counsel for the appellant and the decisions in *Standard Chartered Bank Ltd v Walker & Anor*,[2] *Kian Choon Investments (Pte) Ltd v Societe Generale & Anor*,[3] and *Bishop v Bonham*.[4] The learned judge refused to follow *China and South Sea* B *Bank Ltd*[1] on the ground that the situation in that case was different from the facts in the instant case.

Upon a thorough consideration of the whole matter, the learned judge came to the following conclusions:

> C On 19 March 1990, Jimmy Chong Chee Ming informed the plaintiff by letter that the closing price on 16 March 1990 was RM4.04 per share. On 27 March 1990, the plaintiff wrote to the defendant that it would 'sell the shares immediately'.
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> The plaintiff however did not sell the shares immediately. It took the plaintiff more than two months before they decided to sell the shares and according to Mr Kuah Tian Nam in his affidavit affirmed on 8 October 1991, by that time the price of the shares had gone down to RM2 per share.
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> D From the evidence and the circumstances of this case, it is arguable whether the plaintiff, as mortgagee exercised their duty to take reasonable care to obtain a proper price. It is also arguable whether the plaintiff acted in good faith in the disposal of the said shares or whether the plaintiff took reasonable steps to obtain the best price. On 27 March 1990, the plaintiff agreed to sell the shares immediately. Yet the plaintiff did not do anything until after the expiry of more E than two months. It can be argued that the conduct of the plaintiff was that, to borrow Thean J's words, of 'calculated indifference to the position of the mortgagor'.
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> In the circumstances this is not a proper case for summary judgment. There are triable issues which should be decided at the trial (at pp 32 and 33 AR).

F The approach to be taken by an appellate court in an O 14 appeal has been settled. The appellate court should not regard the appeal as reviewing the exercise of the judge's discretion but should approach the appeal as a rehearing. This principle was accepted by this court in *Koh Siak Poo v Perkayuan OKS Sdn Bhd & Ors*,[5] following *Malayan Insurance (M) Sdn Bhd* G *v Asia Hotel Sdn Bhd*,[6] *National Company For Foreign Trade v Kayu Raya Sdn Bhd*[7] and *European Asian Bank AG v Punjab & Sind Bank (No 2)*.[8]

In this appeal, counsel for the appellant attacked the decision of the learned judge, particularly on his finding that there was a triable issue with respect to the duty of care owed by the appellant to the respondents in realizing the securities of the respondents. Counsel submitted that the H judge misconstrued *China and South Sea Bank Ltd*,[1] wherein the Privy Council had already held that the bank owed no duty of care to guarantors to exercise its power of sale over the mortgaged securities. Counsel further submitted that the three cases relied on by the judge in preference to the *China and South Sea Bank Ltd*[1] case was wrong by virtue of the doctrine of I stare decisis. In our view, what is involved in this appeal is a question of triable issue arising as a matter of evidence and fact as opposed to law. The judge's finding that it is arguable whether the appellant as mortgagees had exercised their duty of care and whether the bank had acted in good faith in the disposal of the said securities are derived from the evidence and the

circumstances he found in the case. In this respect, the function of the appellate court should be as what was said by Goff LJ (as he then was) in *European Asian Bank AG*[8] at p 654:

> If the judge has already decided, on the evidence, that there is a triable issue on a question of fact, it must in the very nature of things be unlikely that this court will interfere with his decision and decide that no trial should take place; because, where such a conclusion has already been reached by a judge, this court will be very reluctant to hold that there is no issue or question which ought to be tried.

Referring to *Cow v Casey*,[9] Goff LJ went on to state:

> But where the appeal raises a question of law, this court may be more ready to interfere. Moreover, at least since *Cow v Casey* [1949] 1 All ER 197, [1949] 1 KB 474, this court has made it plain that it will not hesitate, in an appropriate case, to decide questions of law under O 14, even if the question of law is at first blush of some complexity and therefore takes 'a little longer to understand'. It may offend against the whole purpose of O 14 not to decide a case which raises a clear-cut issue, when full argument has been addressed to the court, and the only result of not deciding it will be that the case will go for trial and the argument will be rehearsed all over again before a judge, with the possibility of yet another appeal ...

In *Lloyds Bank Ltd v Ellis-Fewster*,[10] Sir John Donaldson MR (as he then was), stated at p 562 as follows:

> In a case where the triability of the issue depends upon evidence as opposed to law, I would think it a very surprising situation if the Court of Appeal was prepared to disturb the judge's view. If one judge thinks there is a triable issue, it would be surprising if two or three judges think there is not. It is quite different if you are dealing with a triable issue which arises as a matter of law. *When it arises as a matter of evidence and fact, it is most unlikely that the Court of Appeal would interfere with the discretion of the judge below.* (Emphasis added.)

In the present appeal, since the triable issues, as found by the learned judge, arose as a matter of evidence, following the above principles, it would be wrong for this court to interfere with the learned judge's discretion. Furthermore, upon considering the issues raised in the amended defence, we find ourselves in complete agreement with the conclusions of the learned judge. Accordingly, we hold that this is not an appropriate case for summary judgment.

This appeal is dismissed with costs. We direct that this case be remitted to the High Court below to be tried together with Kuala Lumpur High Court Civil Suit No D1–23–2927–1988 by Zakaria Yatim J.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim